

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KAREN AMBROSINO and FEDERAL JUDICIARY, U.S. BANKRUPTCY
COURT, DISTRICT OF NEW JERSEY, Newark, NJ

*Docket No. 00-806; Submitted on the Record;
Issued September 20, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether appellant has established a recurrence of disability as of August 16, 1997; and (2) whether appellant has established that her August 12, 1996 wage-earning capacity determination should be modified.

The Office of Workers' Compensation Programs has accepted that appellant sustained thoracic and lumbar sprain/strain, as well as L3 radiculopathy, as a result of lifting sacks in the performance of duty on April 12, 1993. Appellant returned to work intermittently in a light-duty position and stopped working at the employing establishment by April 1, 1995. By decision dated August 12, 1996, the Office reduced appellant's compensation to reflect her wage-earning capacity as represented by her actual earnings in a sedentary private employment position.

Appellant filed a notice of recurrence of disability commencing August 16, 1997. In a decision dated January 30, 1998, the Office determined that appellant had not established a recurrence of disability. By decision dated January 8, 1999, an Office hearing representative affirmed the prior decision. In a decision dated September 14, 1999, the Office denied modification.

The Board finds that appellant has not established a recurrence of disability commencing August 16, 1997.

When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that light duty can be performed, the employee has the burden to establish by the weight of reliable, probative and substantial evidence a recurrence of total disability. As part of this burden of proof, the employee must show either a change in the nature and extent of the injury-related condition, or a change in the nature and extent of the light-duty requirements.¹

¹ *Terry R. Hedman*, 38 ECAB 222 (1986).

Appellant has argued that the evidence establishes a change in the nature and extent of the employment-related condition as of August 16, 1997. The medical evidence is not, however, of sufficient probative value to meet appellant's burden of proof. The Board notes that there is limited contemporaneous evidence regarding any change on August 16, 1997. In a report dated November 24, 1997, Dr. Andrea Frank, an osteopath, stated that on September 23, 1997 appellant was seen with a "recurrence of pain," noting that appellant's symptoms have "waxed and waned since initial injury and appear to have been exacerbated with this most recent injury." Dr. Frank did not clearly explain how appellant's employment-related condition had been exacerbated. In a report dated January 29, 1998, she reported that appellant had a recurrence of a low back injury on September 23, 1997 while at work, without further explanation. In a report dated July 27, 1999, Dr. Frank states that "the incident the patient describes having occurred at work in fact was a recurrence of her back pain only.... The pain recurred spontaneously in the same area as she had previously had pain since April 12, 1993." She does not provide a reasoned medical opinion establishing that on or around August 16, 1997 there was a change in appellant's employment-related condition. She refers to pain recurring spontaneously, without discussing the specific diagnosed conditions that continue to be related to the April 12, 1993 injury and describing the cause and mechanism of any change that occurred. Dr. Frank indicated that appellant reported emergency room treatment prior to September 23, 1997, but there is no such medical evidence of record.

The Board finds that the medical evidence from Dr. Frank is not of sufficient probative value to meet appellant's burden of proof in this case. She did not provide a reasoned medical opinion, based on a complete factual and medical background, establishing a recurrence of disability in this case.

The Board further finds that appellant has not established that a modification of the wage-earning capacity determination is warranted.

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous.² The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.³

Since a wage-earning capacity determination was made on August 12, 1996, appellant's subsequent claim for compensation raises the issue of whether a modification of the determination may be warranted. The original wage-earning capacity determination was based on appellant's actual wages of \$10.00 per hour as a clerk in private employment commencing June 10, 1996. Under section 8115(a) of the Federal Employees' Compensation Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent her wage-earning capacity.⁴ Generally, wages actually earned are the

² *Sue A. Sedgwick*, 45 ECAB 211 (1993).

³ *Id.*

⁴ 5 U.S.C. § 8115(a).

best measure of a wage-earning capacity and, in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.⁵ The Office followed appropriate procedures for wage-earning capacity based on actual earnings,⁶ and reduced appellant's compensation in accord with 20 C.F.R. § 10.303. There is no evidence of error in the original wage-earning capacity determination.

With respect to a material change in the nature and extent of the injury-related condition, the Board finds, for the reasons discussed above, that the medical evidence did not establish a change in the employment-related condition as of August 12, 1996. Accordingly, the Board finds that a modification of the wage-earning capacity determination is not warranted in this case.

The September 14 and January 8, 1999 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
September 20, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Member

⁵ *Dennis E. Maddy*, 47 ECAB 259 (1995).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.7 (December 1995).